not been examined by Enche Suleiman. The learned president held the view that this fact by itself did not point to guilt but was a factor to be considered in establishing guilt.

That, in my opinion, is the right approach; the learned president is not guilty of any error of principle and I certainly do not take the view that his judgment reveals any misapprehension of the effect of the evidence which was called before him.

It is settled law that mere failure of the appellant to account for the monies entrusted to him on the dates specified in the three charges might not be a foundation of his conviction in all cases but where he was unable to account and render an explanation for his failure, which was not true, an inference of misappropriation with dishonest intent might readily be made. In my opinion if there was such subsequent payments then the Singapore office of Malaysia-Singapore Airways which did the processing of all daily returns would have discovered the same. The learned president found as a fact that the Singapore office did not find that the monies were subsequently paid. The other aspect of the matter is that since this is within the knowledge of the appellant, whose duty it was to prepare these returns, it was up to him to show the existence of such fact which is consistent with his innocence. He has failed to do that. For the purpose of establishing dishonest intention, it is not the law in this country, any more than it is the law in India, that the prosecution should go further and also prove the actual mode of misappropriation or conversion. Once the prosecution have proved that the appellant was entrusted with money for a specific purpose and that he has failed to account for it or has done something which is clearly indicative of his dishonest intention, the charge of dishonest misappropriation must be held to have been established unless the appellant shows the existence of some fact or circumstance within his own knowledge which is consistent with his own innocence. It must be stated here that for the purpose of establishing dishonest intention the prosecution is not required to eliminate all possible defences and circumstances which might exonerate the appellant, or that apart from proving the appellant's possession of the money and his inability to account for it, it has also to prove the exact manner of his disposal of the money in a manner contrary to the purpose for which he received it.

The offence of criminal breach of trust has so polarized the country that we can no longer accept it with the same passivity we have displayed towards such evil before. Unless the offence is met with substantial sentence adequate deterrence will not be achieved. As I have said before and I say it again, the sentence must reflect the gravity of the offence. The present case is one of extreme premeditation. The appellant whose duty it was to account for all monies entrusted to him, had failed to discharge his responsibilities. In my view the sentence of 12 months is not adequate. However, I would not interfere with the sentence. My observation is directed to would-be offenders and to those whose duty it would be to hear similiar cases.

The appeal is dismissed.

Appeal dismissed.

WILLIAM TAN CHENG ENG v. PUBLIC PROSECUTOR

[C.C.A. (Wee Chong Jin C.J., Tan Ah Tah and Chua JJ.) August 18, 1970]

[Singapore — Criminal Appeal No. Y. 17 of 1969]

Penal Code, s. 300 — Murder — Murder by car — Knowledge that act is so imminently dangerous that it must in all probability cause death — Failure of trial judge to direct jury on knowledge of consequences of act — Conviction set aside.

The appellant had been charged with murder. It was alleged that while driving a car along Bedok Road in Singapore he caused the death of an approaching motor cyclist in such circumstances that he knew his manner of driving was so imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death. The trial judge in his summing up to the jury did not direct the jury on the vital ingredient which the prosecution had to prove, namely that the appellant knew the consequences of his act.

Held: (1) it is not sufficient to amount to murder under section 300 for an act to be so imminently dangerous that it must in all probability cause death. Such an act becomes murder only if the person who commits the act and death results, knew when committing the act, that it was so imminently dangerous that it would in all probability cause death or such bodily injury as was likely to cause death;

(2) the learned trial judge had omitted in his summing up the most vital ingredient which the prosecution had to prove, namely that the appellant knew the consequences of his act;

(3) on the evidence no reasonable jury could have found beyond a reasonable doubt that the appellant had at the material time knowledge that he was driving in a manner that was imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death;

(4) there was therefore no sufficient evidence on which a reasonable jury could have found the appellant guilty of murder and the conviction for murder must be set aside and a conviction under section 26 of the Road Traffic Ordinance substituted for it.

COURT OF CRIMINAL APPEAL.

David Marshall (*N. Ganesan* with him) for the appellant.

Francis T. Seow (Solicitor-General) (*Tommy Neo* (Deputy Public Prosecutor) with him) for the respondent.

Wee Chong Jin C.J.: At the conclusion of the hearing of this appeal we set aside the conviction of murder and substituted a conviction under section 26 of the Road Traffic Ordinance. During the course of a short oral judgment we intimated we would give our reasons in writing at a later date.

We now proceed to do so. The appellant was charged with the offence of murder in that he, "on or about the 8th day of December 1968, at about 4.45 p.m. at Bedok Road near Jalan Bilal, Singapore, committed murder by causing the death of one Ahmad bin

Yassin." The offence of murder is defined in section 300 read with section 299 of the Penal Code and these two sections read as follows: —

"299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

"300. Except in the cases hereinafter excepted culpable homicide is murder —

Firstly — if the act by which the death is caused is done with the intention of causing death; or

Secondly — if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or

Thirdly — if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

Fourthly — if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid."

The case for the prosecution was that the appellant committed murder under the fourth clause of the definition in section 300 in that while driving his 1954 model Ford Prefect car along Bedok Road in the direction of the sea he caused the death of an approaching motor cyclist, Ahmad bin Yassin, in such circumstances that he knew that his manner of driving was so imminently dangerous that it must in all probability cause death, or such bodily injury as was likely to cause death.

The facts relied on by the prosecution were these. The appellant while driving his car along Changi Road saw in front of his car and seated in the front passenger's seat of a Morris car a girl, Miss Poh, working in the same office with whom he had been going steady from January 1966 till May 1968. Miss Poh had broken off this steady relationship in May because of his possessive nature. She was seated beside a friend, Mr. Say, in his Morris car and they were going back to the city after having been to Changi Beach earlier that Sunday afternoon.

The appellant had two male friends with him in his car and on seeing Miss Poh, he gave chase and overtook the Morris car. After overtaking he slowed down and stopped his car by the grass verge so abruptly that Say had to apply his brakes to avoid colliding with the Ford car. Miss Poh then told Mr. Say not to stop and Say overtook the Ford car and proceeded driving fast along Changi Road with the Ford car following. Both cars turned left into Bedok Road which is a straight and longish stretch of road. The appellant overtook the Morris car and again slowed down to a speed of about 10 m.p.h. whereupon Say in his Morris car overtook the appellant's Ford car and drove on at a speed of about 50 m.p.h. An independent prosecution eye-witness said that there was no other traffic along Bedok Road. The appellant subsequently, and still along Bedok Road, caught up with the Morris car and the evidence was that the Ford car first came into contact with the rear of the Morris car and then came into contact with the front off-side mudguard of the Morris car and as a result of the second impact the Ford car became unsteady and zig-zagged diagonally to the right and came into headlong collision with the deceased who was approaching on his motor cycle travelling on its proper side of the road. The motor cyclist died almost instantaneously.

The prosecution said that on those facts the appellant by driving his car in an extremely reckless and dangerous manner with utter disregard for, or total indifference to other users of the road had committed murder within the meaning of the fourth clause of section 300 of the Penal Code. The law is clear. Knowledge on the part of an accused person of the consequences of his act which has resulted in death is an essential ingredient of the offence of murder under the fourth clause of section 300. In order to succeed the prosecution must prove beyond a reasonable doubt that the *appellant knew*, when he drove his car in such a manner as to come into contact first with the rear and then with the front off-side mudguard of the Morris car, that it was so imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death.

The trial judge in a long and detailed summing-up to the jury however failed to direct the jury that in order to convict the appellant of murder they must be satisfied beyond a reasonable doubt on the evidence before them that the appellant, in driving as he did, was doing an act which he knew was so imminently dangerous that it must in all probability cause death, or such bodily injury as was likely to cause death. Towards the end of a long summing-up the following direction was given: —

"So members of the jury, I don't think I need be very much longer with you except that I should like to remind you of your duties in this respect. I have given you two possible verdicts — I mean the verdict that the prosecutor wants is there — I repeat again, if you are satisfied on the evidence as a whole from the first word of the first witness to the last word of Mr. Riley, the last witness for the defence including the statement by the accused, if you feel satisfied that the prosecution has, really, beyond a reasonable doubt established a case of murder as propounded by the prosecution under clause 4, in that the accused was doing an act which was so imminently dangerous that it must most probably, almost to a certainty, cause death having regard to traffic conditions, having regard to all the circumstances that took place on that day — I mean there was this probability of a high degree that must cause either death or such injury as was likely to cause death — then I think it is your bounden duty to find a verdict as charged."

Again, a little later on the following direction was given: —

"You know, you will consider those ingredients and I hope you will remember them — that the act was so imminently dangerous as in all probability, meaning almost a certainty, most probably, you would be very surprised if it didn't cause death or injury likely to cause death. Even if you knock down a man who dies subsequently — with that injury likely to cause death — that would be enough. You don't have to kill a man instantaneously, but in this case the man was killed instantaneously."

The two passages we have quoted from the summing-up omitted the most vital ingredient which the prosecution had to prove, namely, that the appellant knew the consequences of his act. It is not sufficient to amount to murder under section 300 for an act to be so imminently dangerous that it must in all prob-

ability cause death. Such an act becomes murder only if the person who commits the act, and death results, knew, when committing the act, that it was so imminently dangerous that it would in all probability cause death, or such bodily injury as was likely to cause death.

Another ground on which we came to the conclusion that the murder conviction could not stand was that on the evidence no reasonable jury could have found beyond a reasonable doubt that the appellant at the material time knew that he was driving in a manner that was so imminently dangerous that it must in all probability cause death, or such bodily injury as was likely to result in death. The prosecution evidence of what took place along Bedok Road was given by Miss Poh and Say and the state of the traffic during the most material time was given by an independent eye-witness, Abdul Rahim. Abdul Rahim said he first saw the two cars approaching him about 400 yards from where he was standing from the direction of Changi Road. There was no other traffic between him and them. The picture then, according to the prosecution evidence, was of an angry, jilted young man, driving a 1954 model Ford Prefect along Bedok Road, overtaking and then being overtaken and finally overtaking another car in which his former "steady" girl friend was a passenger. When overtaking the Morris car on the final occasion, he drove his Ford car in such a manner as to first come into contact with the rear and then with the front off-side mudguard of the Morris car. Having regard to what had happened along Changi Road, but bearing in mind that there was no other traffic at the material time while both cars were proceeding along Bedok Road and that no harm was caused to the passengers or to the Morris car which stopped by the left hand side of the road, the most adverse inference that can be drawn from the appellant's manner of driving was that he intended to cause harm to the passengers of the Morris car.

In our judgment there was no sufficient evidence on which a reasonable jury could find the appellant guilty of murder under the fourth clause of section 300 of the Penal Code.

Conviction for murder set aside and conviction under section 26 of the Road Traffic Ordinance substituted.

Solicitors: *Osborne-Jones & Co.*

HIMATSING & CO. v. P.R. JOITARAM

[C.A. (Wee Chong Jin C.J., Tan Ah Tah and Chua JJ.) August 31, 1970]

[Singapore — Civil Appeal No. 16 of 1970]

Contract — Breach of commercial contract — Failure to deliver goods in accordance with stipulated term — Time — Whether esence of contract — Mercantile or trade usage among Indian merchants in Singapore.

Sale of Goods — Delivery — Time — Essence of contract — Waiver — Lack of evidence of — Sale of Goods Act, 1893, s. 10(1).

The plaintiff (respondent) claimed damages against the defendant firm (the appellant) for breach of contract. The plaintiff had agreed to sell and the defendant firm to purchase 10 tons of Indian black cardamon at the price of $3.60 per picul. The contract provided for "shipment during June/July, 1966" and for "delivery to buyer's store." The plaintiff delivered 2½ tons in circumstances which resulted in a dispute between the parties. Eventually through their respective solicitors, the defendant firm agreed to accept delivery of the balance of 7½ tons "within 3 days of the arrival at Singapore of the vessel s.s. *Manoloeverette.*" The ship arrived on November 8, 1966 but the plaintiff did not attempt to deliver the balance to the defendant firm until November 21, 1966 when he brought the goods to the defendant firm's shop. The defendant firm refused to accept delivery. Subsequently, the plaintiff sued the defendant firm for breach of contract. The defence, *inter alia*, was that it was an essential term of the contract that delivery be made within 3 days of the arrival of the ship at Singapore, and in this respect time was of the essence of the contract. At the trial the plaintiff called a witness to prove, *inter alia*, a mercantile or trade usage among Indian merchants in Singapore relating to delivery of goods imported by sea into Singapore "that in any contract for the sale of goods where there is a term in the contract requiring delivery within a specified time, that does not make time the essence of the contract in the absence of specific term that the time for delivery stated in the contract shall be of the essence of the contract. All that that term means is that delivery must be made within a reasonable time."

The learned trial judge found: (1) time of delivery was not of the essence of the contract; (2) even if time was of the essence of the contract, "the conduct of the parties ... and particularly that of the defendant had waived his rights regarding this stipulation of time"; (3) accepting there was a mercantile or trade usage of some kind binding on the parties, that "if the defendant wanted to repudiate this contract for non delivery then he should have given the plaintiff at least 24 hours notice of his intention to do so, so that the plaintiff could have had an opportunity to fulfil the contract." The defendant firm appealed.

Held, allowing the appeal: (1) in most mercantile transactions, as regards stipulations other than those relating to time of payment, time is of the essence of the contract. The contract sued on in this case was an ordinary commercial contract for the sale of goods. On the evidence, the plaintiff had failed to prove that as regards the 7½ tons of cardamons the stipulated time of delivery "within 3 days after the arrival of the ship" was not of the essence of the contract;

(2) as regards the question of mercantile or trade usage there was no evidence that the stipulation as to time for delivery was the normal stipulation in this kind of trade;

(3) there was no evidence to support the finding of the learned trial judge that the subsequent conduct of the defendant amounted to a waiver.

Case referred to:-

(1) *Hartley* v. *Hymans* [1920] 3 K.B. 475.

COURT OF APPEAL.

C. S. Woo for the appellant.

J. B. Jeyaretnam for the respondent.

Wee Chong Jin C.J. (delivering the judgment of the court): At the conclusion of the hearing we allowed the appeal and intimated we would give our reasons in writing at a later date. We now do so.

The plaintiff claimed damages against the defendant firm for breach of contract. The plaintiff had agreed to sell and the defendant firm to purchase ten tons of Indian black cardamon (big elcha) at the price of $3.60 per picul. The contract provided for "shipment during June/July, 1966" and for "delivery to buyer's store". The plaintiff delivered 2½ tons in